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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. ROBERT OLNEY NICHOLSON, Defendant and Appellant.	2d Crim. No. B260063 (Super. Ct. No. F494992001) (San Luis Obispo County)

Robert Olney Nicholson appeals from the judgment denying his petition for a finding that he is factually innocent of the charge for which he was arrested: making a criminal threat in violation of Penal Code section 422.[1] An appeal lies from the judgment. (§ 851.8, subd. (p)(1).) Appellant's arrest led to the filing of a felony complaint, which was dismissed before the preliminary hearing was conducted. According to the People, it was dismissed "for an inability to prove the charge[] beyond a reasonable doubt, primarily due to inconsistent witness statements." We affirm.

Facts

Lisa Benko and appellant resided together and "had been in a relationship . . . for about 20 years." On September 10, 2013, Benko had lunch with Guadalupe Esquivel at his home. When Benko left Esquivel's home, she telephoned appellant.

[1] All statutory references are to the Penal Code.

He told her that Esquivel "was accusing him of being a drug user" and that he "was gonna kill that rotten mother fucker." Benko returned to her residence, where she met appellant. Benko had hidden his guns. At appellant's request, she told him where the guns were located. Appellant "retrieved the guns."

Benko "heard [appellant] on the phone with Esquivel telling him he was going to kill him." After the telephone conversation, appellant told Benko that "he was 'going over there.' " Benko "assumed [he] was going over to [Esquivel's]." After appellant drove away, Benko "called [Esquivel] and told him that [appellant] had just left, and that he had a gun with him. [She] assumed that [appellant] had a gun, but did not see him with a gun." Benko then telephoned appellant and told him not to go to Esquivel's home. Appellant asked her where Esquivel lived and "made the comment to [Benko] that 'the chicken shit had the gate closed.' "

Sheriff's deputies detained appellant shortly after he had driven away from Benko's residence. No evidence was presented that they had found a firearm on his person or inside his vehicle. After appellant's arrest, deputies found two handguns inside Benko's residence.

Appellant told Deputy Sheriff Garrett that he had retrieved one of the guns from the residence, "walked outside and then put it right back." Appellant said that, after leaving Benko's residence, he had not driven to Esquivel's home.

Deputy Garrett interviewed Esquivel, who said that appellant had told him over the telephone that "he was going to come by and kill him." Esquivel "hung up on [appellant] and initially did not believe the threat. About a minute later, Esquivel received a phone call from Benko stating [appellant] had a gun and was on his way over to Esquivel's residence. Esquivel immediately called 911 and stated he feared for his safety and his family's safety based upon that additional information."

Appellant's Petition

In his petition for a finding of factual innocence, appellant argued that there is no reasonable cause to believe that his threat to kill Esquivel satisfied one of the elements of making a criminal threat in violation of section 422. The missing

element is that the person who makes the threat must "thereby cause[]" the person threatened "reasonably to be in sustained fear for his or her own safety or for his or her immediate family's safety." (§ 422, subd. (a).) Appellant contended that it was Benko's telephone call to Esquivel, not his threat, that caused Esquivel to be in sustained fear for his safety. Appellant asserted that Benko had mistakenly told Esquivel that he had a gun and was on his way to Esquivel's home.

Trial Court's Ruling

The trial court found "that all of the elements for a criminal threat pursuant to Penal Code § 422 are satisfied." The court reasoned, "The fact that the victim, Mr. Esquivel, didn't suffer sustained fear from the immediate threat until after the phone call from Ms. Benko a minute or so later telling him that [appellant] had a gun and was on his way over is no defense to the criminal threat itself."

Legal Principles and Standard of Review

"A finding of factual innocence . . . shall not be made unless the court finds that no reasonable cause exists to believe that the arrestee committed the offense for which the arrest was made." (§ 851.8, subd. (b).) " ' " 'Reasonable cause' " ' is . . . ' "defined as that state of facts as would lead a man of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." ' [Citations.] To be entitled to relief under section 851.8, '[t]he arrestee . . . thus must establish that facts exist which would lead *no* person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion that the person arrested . . . is guilty of the crimes charged. [Citation.]' [Citation.]" (*People v. Adair* (2003) 29 Cal.4th 895, 904, italics added.) "Defendants must 'show that the state should never have subjected them to the compulsion of the criminal law—because no objective factors justified official action . . . .' [Citation.] In sum, the record must exonerate, not merely raise a substantial question as to guilt. [Citation.]" (***Id.***, at p. 909.)

"[A] reviewing court must apply an independent standard of review and consider the record de novo in deciding whether it supports the trial court's ruling."

(*People v. Adair, supra*, 29 Cal.4th at p. 905.) "The terms of section 851.8(b) - precluding a finding of factual innocence 'unless no reasonable cause exists' - impose an objective legal standard on both trial and appellate courts, and do not accommodate any exercise of discretion to which the appellate court should defer." (***Id***., at p. 908.)

Appellant Did Not Carry His Burden of Establishing Factual Innocence

Appellant did not carry his burden of " 'establish[ing] that facts exist which would lead no person of ordinary care and prudence to believe or conscientiously entertain any honest and strong suspicion" that appellant had caused Esquivel to be in sustained fear for his safety. (*People v. Adair, supra*, 29 Cal.4th at p. 904.) Although appellant apparently did not have a gun when he drove away from Benko's residence, his conduct reasonably led Benko to believe that he had a gun and was on his way to Esquivel's home to carry out his threat to kill him. At appellant's request, Benko informed him where she had hidden his guns. Benko saw appellant retrieve the guns. Appellant told Deputy Garrett that he had retrieved one of the guns, "walked outside and then put it right back." Appellant did not convey this information to Benko. She heard him threaten over the telephone to kill Esquivel. Afterward, appellant said that "he was 'going over there.' " Benko reasonably interpreted this statement as meaning that appellant was going to Esquivel's home, and it appears that he actually drove there. When Benko telephoned appellant after warning Esquivel, appellant asked her where Esquivel lived and "made the comment to [Benko] that 'the chicken shit had the gate closed.' " This comment implies that appellant was unable to enter the grounds of Esquivel's home because the entry gate was closed.

Thus, based on appellant's own words and conduct, Benko acted reasonably in warning Esquivel. Indeed, she had a duty to warn him. In these circumstances, a person of ordinary care and prudence would believe and conscientiously entertain an honest and strong suspicion that appellant, not Benko, had caused Esquivel to be in

sustained fear for his safety. (§ 422, subd. (a).) "In sum, the record [does not] exonerate" appellant. (*People v. Adair, supra*, 29 Cal.4th at p. 909.)

Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED.

YEGAN, J.

We concur:

GILBERT, P.J.

PERREN, J.

Michael L. Duffy, Judge

Superior Court County of San Luis Obispo

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